STATE OF MICHIGAN

COURT OF APPEALS

TROY GANSEN,

Plaintiff-Appellant,

v

JAMIE M. PHILLIPS,

Defendant-Appellee,

and

JANET PHILLIPS

Intervening Defendant-Appellee.

UNPUBLISHED
May 29, 2012

No. 304102
Wayne Circuit Court
Family Division
LC No. 09-114890-DC

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Plaintiff, the minors' father, appeals by right the trial court's judgment awarding sole custody to intervening defendant, Janet Phillips. We affirm.

Plaintiff first argues that the trial court failed to apply the parental presumption of MCL 722.25(1). See *Hunter v Hunter*, 484 Mich 247, 259, 272; 771 NW2d 694 (2009). We disagree.

Generally, a court should not "issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c); See *Foskett v Foskett*, 247 Mich App 1, 5-6; 634 NW2d 363 (2001). "The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). In other words, an established custodial environment exists where there is a "relationship of a significant duration in which [the child] was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs [and] . . . is marked by qualities of security, stability and permanence." *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

But in *Hunter*, which involved a custody dispute between a natural parent and a third party, our Supreme Court considered the effect of statutory presumptions and the fundamental

right of parents to raise their children. *Hunter*, 484 Mich at 251, 257. The Child Custody Act of 1970 (CCA), MCL 722.21 *et seq*., provides that when the custody dispute is between a parent and a third party, "the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence." MCL 722.25(1). The *Hunter* Court held "that the established custodial environment presumption in MCL 722.27(1)(c) must yield to the parental presumption in MCL 722.25(1)." *Hunter*, 484 Mich at 279. In other words, the burden is on a third party to demonstrate by clear and convincing evidence that "custody with the natural parent is not in the best interests of the child." *Id*. at 279-280. "In order to make this showing, [the third party] must prove that 'all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person.'" *Hunter*, 484 Mich at 278, quoting *Heltzel v Heltzel*, 248 Mich App 1, 27; 638 NW2d 123 (2001).

In this case, the trial court specifically noted, and adhered to, its obligation under *Hunter*. The court explicitly recognized that the non-parent had the burden of proving by clear and convincing evidence that it was not in the best interests of the minor child to award custody to plaintiff parent. The trial court conducted a full evidentiary hearing, considered the established custodial environment, made thorough and careful findings of fact as to each best interest factor, as Hunter instructs, and based on those findings, concluded that all but two factors favored the guardian and that those two factors did not favor either party. While plaintiff disagrees with the trial court's conclusions that the guardian presented clear and convincing evidence proving that plaintiff should not be awarded custody of the minor children, this does not mean that the trial court failed to engage in the appropriate analysis.

Moreover, plaintiff seems to be misinterpreting the parental presumption. Most of the evidence submitted at trial was conflicted by other evidence presented at the hearing, and thus, the trial court was required to make credibility decisions regarding what evidence was more reliable and believable. The parental presumption, which relates to the burden of proof, does not imply that the trial court's ability to make credibility decisions and to weigh the evidence is somehow diminished. The trial court was not required to automatically find that plaintiff's evidence was credible merely because he was the natural parent. Plaintiff cites no authority to support such conclusion, and *Hunter* never indicates that such a result is required. Additionally, this Court has specifically stated that it "will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

Next, plaintiff argues that many of the trial court's factual findings were against the great weight of the evidence. We disagree.

"The great weight of the evidence standard applies to all findings of fact" in custody cases. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000); MCL 722.28. Thus, a trial court's findings of fact "should be affirmed unless the evidence clearly preponderates in the opposite direction." *Berger*, 277 Mich App at 705.

First, plaintiff argues that the trial court's factual findings failed to take into account that plaintiff had changed. The Court in *Hunter* stated that when there has been a previous court assessment of the natural parent's unfitness, a trial court may not simply rely on this past finding to justify denying custody to the natural parent. *Hunter*, 484 Mich at 277 n 61. In this case, however, there was no prior court determination that plaintiff was unfit. Moreover, "when a court evaluates the best interest factors in MCL 722.23, a past finding may still be considered," but the trial court should also assess whether "'any other changes in circumstances.'" *Hunter*, 484 Mich at 277 n 61, *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). Thus, the trial court must, when conducting its best interests review, "consider all relevant, up-to-date information." *Hunter*, 484 Mich at 278-279. Consequently, the trial court did not err in considering plaintiff's past behavior in addition to plaintiff's more recent behavior.

Plaintiff next argues that the trial court made a finding of fact against the great weight of the evidence when it relied on mere speculation to conclude that plaintiff purposely tampered with the court ordered drug tests. In assessing best interest factors (b) and (f), the trial court stated that plaintiff tampered and manipulated the court ordered drug test results. The trial court explained that since the drug detox kit was ordered the same day as plaintiff's court ordered drug test. Moreover, because plaintiff's body hair was extremely short, and he did not report for drug testing within the allotted time, it was presumed that plaintiff did so to manipulate the results to avoid revealing his use of illegal drugs. Thus, the court concluded that plaintiff, plaintiff's wife, and a third witness claiming to have used the drug detox kit for a job interview did not provide credible testimony. While plaintiff insists that it was a coincidence that the detox kit was ordered the same day as his court ordered drug test and that he failed to report promptly for the second drug test because of a phone number misunderstanding, we cannot find clear error in the trial court's concluding that this explanation lacked credibility. See *Berger*, 277 Mich App at 705 (stating that this Court will defer to a trial court's credibility decisions). Additionally, the court properly noted that plaintiff even admitted to smoking marijuana as recently as Memorial Day 2009, after he was released from prison and after he had supposedly reformed his life.

Plaintiff also objects to the court's reference to plaintiff's "drug use" and use of "illegal drugs," as evidence of an improper finding of fact that plaintiff used drugs other than marijuana. First, two witnesses testified that plaintiff used crack cocaine, and it was within the trial court's purview to decide that they were providing credible testimony and plaintiff was not. See *Berger*, 277 Mich App at 705. Furthermore, it is not clear that the trial court's mere reference to plaintiff's "drug use" or use of "illegal drugs" was actually tantamount to a finding of fact that plaintiff used crack cocaine, since plaintiff's use of marijuana also constitutes illegal drug use. The trial court's only statement regarding plaintiff and crack cocaine was that Jamie testified that she and plaintiff used it. The court refrained from offering any sort of conclusion or determination regarding the credibility of this testimony.

Plaintiff also contends that the trial court adopted a flawed interpretation of evidence regarding plaintiff's history of domestic violence. The trial court referenced plaintiff's history of domestic violence at various points in its opinion and discussed it most when addressing best interest factor (k), domestic violence, regardless of whether the violence was directed against or witnessed by the child. The trial court noted many domestic violence calls made to the police regarding plaintiff and that plaintiff had served time in jail for violating his probation due to domestic violence. Although plaintiff downplayed the violence of such incidents, he

acknowledged numerous instances of domestic disturbances. Additionally, the trial court noted that Jamie testified that plaintiff physically and mentally abused her on numerous occasions. The trial court determined that Jamie's version of events was more credible. Because we will defer to the trial court's credibility determinations, *Berger*, 277 Mich App at 705, the finding that defendant had a history of domestic violence was not against the great weight of the evidence.

Plaintiff also contends that the trial court improperly implied that he had been involved in sending inappropriate text messages to a 12 year old girl in 2008. The trial court did not actually make a finding of fact regarding this incident. The trial court only stated that plaintiff had been reported for this behavior, that plaintiff had provided an explanation, and that plaintiff's wife had been ordered to not leave her son alone with plaintiff. As seen from the trial court's language, the court never stated whether the allegation was credible and did not reference this incident in the analysis of any of the best interest factors. Findings of fact are determinations the trial court has made from the evidence in the case regarding matters the parties dispute. See *Woody v Cello-Foil Products*, 450 Mich 588, 598-599; 546 NW2d 226 (1996)(WEAVER, J. *dissenting*). Thus, to be a "finding of fact," the point needs to be one that is disputed and one about which the trial court makes a decision. *Id.* Since the trial court did not make a determination regarding the inappropriate nature of these text messages, the trial court did not make a finding of fact.

Next, plaintiff argues that the trial court improperly found that plaintiff's history of petty crimes was more severe than the record reflects. The trial court referenced plaintiff's criminal history a number of times in its opinion, including in the analysis of best interest factors (b) and (f). While plaintiff insists that his criminal history had come to an end years ago and mostly consisted of unverified police reports, this is a significant understatement of plaintiff's behavior. Even disregarding all of the allegations and police reports, plaintiff's acknowledged crimes are serious in and of themselves. As the trial court mentioned, plaintiff was convicted of second-degree criminal sexual conduct of a minor under the age of 13 in 1993, selling marijuana on two separate occasions, committing domestic violence as a probation violation in 2008, and smoking marijuana as recently as Memorial Day 2009, in violation of his probation. Thus, any finding that plaintiff had a serious criminal history was not against the great weight of the evidence.

Plaintiff also claims that the trial court's true error was in failing to recognize that plaintiff had changed and taken full responsibility for his past actions. In its introduction to its opinion, and when addressing best interest factors (b) and (f), the trial court referred to plaintiff; having failed to take responsibility for his behavior. The court also noted plaintiff continued to justify and minimize his behavior. While plaintiff argues that this finding was against the great weight of the evidence, the record demonstrates otherwise. Plaintiff's testimony about his past was one excuse after another, including blaming his probation violation for domestic violence on Jamie's drug addiction, stating that the sexual behavior with the 12 year old in 1993 was consensual, testifying that the $50,000 found in his home only partly came from selling marijuana, explaining that the texts messages to the 12 year old girl in 2008 were because she shared a phone with her mom, explaining that he did not promptly report for drug testing because of an infrequently used cell phone number that he provided, stating that the drug detox kit ordered the same day of his court ordered drug test had nothing to do with him, and arguing that it was Janet's interference that caused a rift between the minor children and plaintiff. Thus, the trial court's finding that plaintiff denied responsibility for his actions and instead justified and minimized his behavior was not against the great weight of the evidence.

Plaintiff also claims that the trial court's finding that there was not a strong emotional bond between plaintiff and the minor children was against the great weight of the evidence. In the analysis of best interest factor (a), the love, affection, and other emotional ties existing between the parties involved and the child, the trial court found that plaintiff presented little evidence of an existing emotional bond. Plaintiff argues that this finding was erroneous, considering family photos, plaintiff's preventing Jamie from aborting the minor daughter and testimony of plaintiff's family. However, the trial court properly noted that the majority of plaintiff's evidence went towards proving that plaintiff loved the minor children, not whether there was a strong emotional bond between plaintiff and the minor children. The trial court also properly noted that plaintiff had been largely absent from the children's lives in the past couple of years, as plaintiff was incarcerated for four months in 2008. In fact, plaintiff even admitted that he had no parenting time from August 2009 until December 2010. Lastly, the trial court observed that plaintiff conceded that his minor son was in therapy because of his fear and anxiety stemming from plaintiff's violence and abuse. Considering all of this evidence, it cannot be said that the trial court's decision was against the great weight of the evidence.

Plaintiff argues that the trial court improperly found that plaintiff was not involved in the minor children's school and church and in the minor son's therapy. First, nowhere does the trial court state that plaintiff was not involved in the minor son's therapy. Second, the trial court correctly relayed plaintiff's own testimony that he did not take the minor children to church because it was not during his parenting time and that plaintiff provided no testimony that he had ever taken the minor children to church. Furthermore, Jamie testified that she had never seen plaintiff attend church in the eight years she was with him. Thus, the trial court's finding that plaintiff was not involved in the minor children's church was not against the great weight of the evidence. The extent of plaintiff's current involvement in the minor children's schooling, as indicated through plaintiff's testimony, seems to be to ensure that Troy does his homework. Not only is that a limited role, Janet also testified that homework was only sent along with the minor children during plaintiff's parenting time three times in 2009 and five times in 2010. Thus, any finding that this did not amount to being involved in the minor children's schooling was not against the great weight of the evidence.

Lastly, plaintiff argues that the trial court erred in failing to focus on the many problems with Janet's living conditions and behavior. Yet, the trial court did review Janet's behavior and living conditions. In discussing best interest factor (j), the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents, the trial court stated that Janet had followed all court ordered parenting time. Regarding best interest factor (e), the permanence, as a family unit, of the existing or proposed custodial home or homes, the trial court mentioned that Janet had lived in a home for 10 years and had been in a stable relationship for 19 years. The trial court also stated that while plaintiff was attempting to draw negative inferences from Janet's willingness to help her nieces and nephews, Janet's willingness to help her family was evidence of the seriousness of Janet's commitment to helping the minor children. Finally, when discussing factor (l), any other factor considered by the court to be relevant to a particular child custody dispute, the trial court found that Janet's alternate life style was not proven to be harmful for the minor children and that Janet's same-sex partner was a part of the nurturing environment affecting the minor children in a positive and supportive way.

Plaintiff's last claim on appeal is that the trial court abused its discretion in failing to award him attorney fees. We disagree.

A trial court's award of attorney fees is reviewed for an abuse of discretion. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *Id*.

A party "who requests attorney fees and expenses must allege facts sufficient to show that . . . the party is unable to bear the expense of the action, and that the other party is able to pay . . . ." MCR 3.206(C)(2)(a). Plaintiff's argument under this rule fails because he did not demonstrate that he was unable to bear the cost of litigation. See *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). The evidence indicated that plaintiff owned his own home, was gainfully employed earning $12 an hour, and that he would soon be promoted to full time employment with additional benefits. Hence, while plaintiff submitted evidence of his attorney fees, he failed to present any evidence that he could not afford them.

Also, while plaintiff alleges that there was a great disparity in ability to pay between him and Janet, plaintiff did not provide evidence regarding Janet's ability to pay. Even considering Janet's former high paying job and upcoming new job earning $60,000 a year, she was unemployed at the time of the deposition and had not started her new job at the time of trial. Further, Janet's household included five people dependent mostly on her. Moreover, Janet was collecting unemployment assistance. Thus, plaintiff did not actually submit any evidence of Janet's financial status or Janet's ability to pay plaintiff's attorney fees. Unsubstantiated assertions, with no supporting evidence, are insufficient to meet the burden of proof for attorney fees. See *Smith v Smith*, 278 Mich App 198, 207-208; 748 NW2d 258 (2008). Thus, the trial court did not abuse its discretion in denying plaintiff's request for attorney fees.

We affirm.

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro